

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SMART SHEET METAL WORKERS
LOCAL UNION 9 (U.S. ENGINEERING)

and

Case 27–CB–256117

SALAHUDDIN BUKHARI HALL, an Individual

Angie Berens, Esq.,
for the General Counsel.
William R. Reinken, Esq.,
for the Respondent.
Spencer J. Kontnik, Esq.,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR LAWS, Administrative Law Judge. This case was tried virtually using the Zoom for Government platform on January 20, 2021. Salahuddin Bukhari Hall (the Charging Party or Hall) filed the original charge on February 12, 2020, and an amended charge on August 20, 2020.¹ The General Counsel issued the complaint on October 9, 2020. SMART Sheet Metal Workers Local Union 9 (hereinafter the Respondent or the Union) filed a timely answer denying all material allegations.

The complaint alleges the Respondent breached its duty of fair representation and restrained and coerced the Charging Party. Specifically, the complaint alleges the Respondent violated Section 8(b)(1)(A) of the National Labor Relations Act (the Act) by: (1) failing and refusing to file a grievance over the Charging Party’s discharge, and (2) threatening the Charging Party that a union official could prevent him from working in the State of Colorado.

¹ All dates are in 2019 unless otherwise indicated. Abbreviations used in this decision are as follows: “Tr.” for transcript; “GC Exh.” for the Acting General Counsel’s exhibit; “R Exh.” for the Respondent’s exhibit; “Jt. Exh.” For joint exhibit; “GC Br.” for the Acting General Counsel’s brief, and “R Br.” for the Respondent’s brief. Although I have included some citations to the record, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited, but rather are based on my review and consideration of the entire record.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a labor organization within the meaning of Section 2(5) of the Act. U.S. Engineering (the Employer) is a corporation with an office and place of business in Westminster, Colorado, and is engaged in the business of providing mechanical engineering services for commercial customers. In conducting its operations during the last 12-month period, the Employer purchased and received at its Colorado locations, goods valued in excess of \$50,000 directly from points outside the State of Colorado, and is therefore an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

At all material times, the Sheet Metal and Air Conditioning Contractors National Association, Colorado Chapter (the Association) has been an organization composed of various employers engaged in the building and construction industry, one purpose of which is to represent its employer-members in negotiating and administering collective bargaining agreements with various labor organizations, including the Respondent. The Respondent operates a non-exclusive hiring hall that maintains collective bargaining agreements with various employers that are members of the Association. Charging Party Hall has been a member of the Respondent Union since he moved to Colorado in 2019.² The Employer at issue here, U.S. Engineering, is an employer-member of the Association.

The Respondent is the non-exclusive source of employment and the collective-bargaining representative of the following employees (the Unit) pursuant to Section 9(b) of the Act:

All employees of the Association Employers and Non Association Employers who are engaged in, but not limited to, the (a) manufacture, fabrication, assembling, handling, erection, installation, dismantling, conditioning, adjustment, alteration, repairing and servicing of all ferrous or non-ferrous metal work and all other materials used in lieu thereof and of all HVAC systems, airveyor systems, exhaust systems, and air handling systems regardless of material used, including the setting of all equipment and all reinforcements in connection therewith; (b) all lagging over insulation and all duct lining; (c) testing and balancing of all air-handling equipment and duct work; (d) the preparation of all shop and field sketches whether manually drawn or computer assisted used in fabrication and erection, including those taken from original architectural and engineering drawings or sketches; including as-built drawings as required in the

² He had previously been a member of the Local 28 in New York.

plan, specification, or bid documents by the owner or engineer; (e) metal roofing; and (f) all other work included in the jurisdictional claims of the International Association of Sheet Metal, Air, Rail, Transportation Workers’.

5 Dwayne Stephens is the Respondent’s business manager, and John Alvino is the business representative. Tony Italiano is the field operations coordinator at U.S. Engineering. In that capacity, he is in charge of hiring through the Respondent’s hiring hall and transferring employees to different jobs at U.S. Engineering.

10 In June 2019, Hall worked a job for U.S. Engineering at the convention center.³ John Perez was the foreman. Hall and Perez clearly despise each other. According to Hall, on the first day at the job, Perez called him a stupid retard and a dumbass veteran, and later threw a pookie cap at him.⁴ (Tr. 22, 225.) In response, Hall threatened to throw Perez out of a 16-story window. (Tr. 140.)

15 Hall complained to Alvino about Perez. On July 31, 2019, there was a reduction-in-force layoff. Alvino came to the jobsite that day with two representatives from U.S. Engineering.⁵ (Tr. 24.) They told Hall he was being moved to another job. At that point, Hall told Alvino he did not like the way Perez talked to him. Alvino recalled, “when he told me that he didn’t like the way John Perez talked to him, and his exact words was, you know, I’ll throw that motherfucker out a window.” (Tr. 195.) Hall did not request that Alvino file a grievance or take any other action that day. Hall started his new job at Troutman and Shreve, another signatory employer, the next day. That job lasted for a few weeks.⁶

25 When the Troutman and Shreve job ended, Italiano from U.S. Engineering offered Hall a job at a project on Wewetta Street. A man named Fabian Gonzalez, also a member of the Respondent Union, was the foreman. Joshua Blackburn, a fellow journeyman, worked at the same jobsite. On Blackburn’s first day, Gonzalez told him that they were going to get rid of Hall soon because of his big mouth. (Tr. 91.) According to Hall, during lunchtime on the second day of the job, Blackburn told him that Fabian was out to get him because of Hall’s previous dispute with Perez.⁷ (Tr. 31.)

³ Hall was not sure how long this job lasted:

Q And how long did you work at that job at the convention center in June of 2019?

A I’m not sure, maybe a few weeks or a few days. I think it was probably, like, no, I think it was, like, maybe a week, maybe -

Q Okay.

A -- a few days, because -

Q And who was the foreman at that job?

(Tr. 21.) Alvino testified that Perez and Hall worked together at WeWork with U.S. Engineering.

⁴ Hall did not report the pookie cap incident until after September 26. (Tr. 225.)

⁵ Hall first testified that reached out to Alvino and Stephens, but his calls were not returned. (Tr. 23–24.)

⁶ Hall also mentioned working at a hospital. (Tr. 27.)

⁷ Blackburn denied having lunch with Hall but said he did convey what Fabian had said the previous day. (Tr. 102.)

Hall felt discriminated against on the jobsite. He testified that Gonzales said he was going to send Hall's "black ass" back to New York and that Gonzalez and a "white guy with long hair" told him he couldn't listen to hip hop. (Tr. 33–34.) Hall also referenced a sign at the jobsite saying, "Go back to New York" but the sign's origin and location are unclear. Hall testified:

A. Fabian drew all the signs. I come back from lunch, they got a sign on his - on his desk. New York, go back to New York. Like, this is the stuff I got to deal with at work.

Q This was on Fabian's desk?

A No, like, there's, like, a cart that's where the blueprint is we can - as a mechanic, I go to his blueprint at his desk and look at the prints and everything. You know, coming back from lunch, I - I guess they figured it was a joke, you know? You can see they put the cardboard from a box and somebody wrote New York and you could see go back home, you know? Like, I felt like I wasn't even wanted. I mean, I didn't care. I'm there to get my money. I don't care what nobody says. I'm a New Yorker, you know?

(Tr. 34.) Hall later testified the sign was in fact on Gonzalez' desk. He stated in his affidavit he didn't know who made the sign, and testified, "I mean, Mr. Will, the signs are everywhere." (Tr. 113.)

Hall told Italiano about his treatment at the jobsite. Italiano told him not to pay any attention to the other workers and to just do his job. On September 13, Hall texted Alvino and asked him to call him. Alvino responded, "Will do, give me some time." (GC Exh. 2.) Hall thinks Alvino called him back a few days later.⁸ (Tr. 36.)

B. Hall's Termination and Aftermath

During the "morning huddle" on September 26, the general contractor told the U.S. Engineering supervisors that "there had been the scent of marijuana coming on the jobsite recently over the last few days," and the supervisors should be on the lookout. (Tr. 166.) A plumber foreman, Jovani Gaeta, noticed marijuana coming from the 9th floor later that morning. Two other supervisors went up to the floor and also smelled marijuana coming from an area by Hall and Blackburn. (Tr. 166–167.)

⁸ Hall's testimony on this regard is somewhat confusing. He testified:

A . . . So I reached out to Jon Alvino, said, man, please give me a call because I really wanted to talk to him, like yo, man, I'm really about to snap at this job, man. You know? Like, I - I wanted to tell him. I didn't - I didn't get an answer. I mean, this is how he does. You know, ever since that - that job with Perez, I can't get him on the phone at all, him or Dwayne.

Q Okay. So did you end up speaking with Jon Alvino that day?

A No, I don't believe so. He never even called me back.

Q Okay.

A I think he called me back, like, a few days later, you know? And I even called - you know, I even called him the next day. And I - I have all the records in my phone right here. I kept everything. So when I called him, what day, I have a whole list of the days I called him and he doesn't pick up.

(Tr. 35–36.) The phone records Hall claimed to have about his repeated calls to Alvino are not part of the record.

According to Hall, Gonzalez was at a meeting offsite and not at the jobsite that morning. The “white guy with the long hair” was acting foreman. The acting foreman approached Hall and told him he needed to go for a drug test because a general contractor had reported seeing him and Blackburn smoking marijuana. As Blackburn emerged from the elevator, the acting foreman told him he also needed to go take a drug test. Hall talked to an unidentified general contractor who said he did not make such a report.⁹ When Hall reported this to the acting foreman, he changed his story and said the test was random. (Tr. 38–42.)

Blackburn’s recollection is different. Blackburn said Gonzalez approached him and told him he was sending him to a drug test because the day before someone smelled marijuana coming from a room where he and Hall were working. Blackburn had never worked with Hall and he told Gonzalez he was not even at the jobsite the previous day. Gonzalez then said they smelled the marijuana that morning. Blackburn found that odd as he had barely been in the building that morning. (Tr. 92–93.)

After some initial resistance, Gaeta transported Hall and Blackburn to a lab for the drug test.¹⁰ Blackburn took the test. Hall drank water so that he could urinate. They waited about 1.5 hours, but Hall was unable to urinate. When Hall told this to Faeta, Hall described Faeta’s response as follows:

And this guy get in my face, Jovani. I’m sitting on the couch. He gets in my face. Josh is my witness. Man, stop being a F-ing bitch and - I don’t know, I guess he think I’m from New York and I’m a gangsta or something. You know, like, man, that’s my previous life, 20 years ago. So he’s spitting in my face, you know, I kind of stood up, yo, man, why are you in my face, man? And I kind of went off on him. You spitting in my face, this and that.

(Tr. 47.) Blackburn recalled that when he came out of the room where he took his drug test, Gaeta was yelling at Hall:

Well, I went in and I took my drug test. And when I come out, him and - Mr. Salah and Mr. Giovanni (sic) was - well, I’m going to say, Mr. Salah and Mr. Giovanni (sic). Mr. Giovanni (sic) was standing over Mr. Salah in a chair. He was screaming in his face, excuse my language, telling him, quit being a bitch; be a man, and go in there and take your drug test. And he told Mr. Giovanni (sic), I can’t. I have medical issues; I can’t

⁹ When asked this person’s identity, Hall responded as follows:

Q BY MS. BERENS: Okay. Salah, when you’re talking about a general contractor, Mr. Reinken just said - as he just stated, we don’t know who that person was, an unidentified witness, do you - do you know who you were speaking to from the general contractor?

A I forgot the name of the actual company.

(Tr. 42.)

¹⁰ Hall initially refused to go to the drug testing site because he felt harassed. He also initially refused to take the test at the drug testing site because he was told someone would need to watch him urinate. (Tr. 129.)

pee. So he called somebody in the - I don't know if it was the Union Hall or if it was somebody with U.S. Engineering.

(Tr. 94.)

Hall called Vicky Shields, the occupational health person at U.S. Engineering, and told her that maybe if he took his insulin he could urinate. (Tr. 48.) According to Hall, he put the phone on speaker so everyone could hear, and Shields told Hall to have Gaeta take him back to the jobsite so he could take his medication, and then return to the lab before the end of the day.¹¹ (Tr. 48–49.)

Blackburn, who was standing by Hall, testified he did not hear the conversation, said that when Hall hung up, he said he needed to go to his scooter to get medication to help him urinate. He recalled Gaeta saying they were going back to the job and then he was going to bring Hall back for his drug test. (Tr. 95–96.)

Shields recalled speaking to Hall on the phone and telling him to drink water. Hall told her that he needed to return to the jobsite and take insulin. Shields responded that he could make that choice, but if he left the clinic, he automatically failed the drug test. (Tr. 185.)

According to Gaeta, Hall asked to go have a cigarette and was told that he would automatically fail the drug test if he left the waiting room. Hall responded, “Fuck this I’m out” and left the waiting room. (R Exh. 1.) Gaeta followed him out and returned to the jobsite with Hall and Blackburn.

When they got back in the car, Hall said Gaeta called him a pussy and berated him about being from New York.¹² Hall then said to Gaeta:

So I told him. You know, I said it. I said, yo man, where I’m from, man, I’m too old to be fighting. I'm gonna pay somebody to beat your ass, man. You know what I mean, I just straight told him like that. Man, I’m 40 years old. I don’t got time for your little games. And I believe that's what the Union’s trying to say how I threatened him.

(Tr. 50–51.) When asked if he threatened Gaeta during the ride back, Hall testified in a previous proceeding:

Yes, I did. And I told him and my exact words were, Yo, man, listen, if I was ten years younger, man, I would have done something to you, but, you know, at the age I’m at right now, the way you got in my face in that clinic, I’d get somebody to tear you up. I wouldn't even get my nails dirty. That’s my exact words.

Q. So you did tell him that you would pay someone to, quote, fuck him up?

A. I would get someone younger to beat his tail. Yes, I did.

¹¹ Blackburn did not know who Hall called and did not hear the conversation.

¹² Blackburn perceived that Gaeta was trying to antagonize Hall into a fight. (Tr. 96–97.)

(R Exh. 5, pp. 55–56.) When Alvino questioned Blackburn about the incident at the time, Blackburn texted him, “Well he did tell him that where he came from people whoop people’s asses like his.” (R Exh. 9.) At trial, Blackburn recalled Hall saying, “where I come from, we handle things differently.” (Tr. 105.)

Hall returned to the jobsite, took his insulin, and drank more water. Once he had to urinate, he asked Gaeta to take him back to the lab. Blackburn recalled Gaeta saying, “fuck you; you can figure it out yourself.” (Tr. 96.) Hall texted Shields, stating, “Ms. Vicky this is Salah hall I just took my insulin what do I do? Go back and take the test?” Shields responded, “Once you leave it is a failed test. The clinic has that protocol. Get your tools and go to the hall.” Hall replied, “I asked you before I left!! Wow this is crazy.” (Jt. Exh, 2, p. 8.) The acting foreman brought Hall’s tools outside and told him he was fired.¹³

Hall tried to call Alvino, but he didn’t answer. He texted Alvino, who texted Hall back saying he was in a meeting and would call him on a break. Hall and Alvino spoke on the phone, and according to Hall, Alvino told him to text his grievance to him, and Alvino would put it on paper and file it for him. (Tr. 59.) Alvino recalled telling Hall to put in writing what happened but never asked for a grievance. (Tr. 197.) Hall then texted Alvino, stating:

Around 7 -730 the plumbers Forman and the second Forman came to me and said Sanders the Walked by me and Josh and smelled weed and we were smoking in a room !! Didn't even know him and don't work with him !!! So I asked who said that and they told me they couldn't say lol. So I asked the GC 1 and 2 and they said know one said that ! Meaning the Forman's were telling the untruth !!!! So josh and I are confused [shrug emoji]. So we go to the test place and I tell them I caint piss ! And I have kidney problems it's hard to pee at times .. so the plumbers Forman gets in my face I mean in my face while I'm on the set and tells me stop F-en being something and be a man !! So I went off on him like get out of my face !! So before we left the test place I called Vicky to ask here if I can go take my insulin and come back and she said yes and I was standing in front of josh and he heard her.. I get back to the job take it and waiting for the guy to take me back and they bring my tools out saying I'm fired cause I didn't take the test. I asked Vicky before we left...

Another not we were singled out because they don't like the fact that I stay to my self and I don't take no crap !! I'm here to make money that's all !!! I hear a lot of talking about me !! Things that I don't pay no attention to !! So they were looking to get me fired cause I heard them talking about it saying they were going to look for shit to write me up with to get my black ass back to New York. I'm no fool this is 2020 I want to go after US engineering and I mean this

So do I need to contact a lawyer and the labor bird and all cause this isn't right at all.¹⁴

¹³ Blackburn complained to Alvino about what transpired that day. Blackburn passed his drug test. He was fired for being a minute late the day he returned to the jobsite. (Tr. 101.)

¹⁴ Like most texts, the texts referenced herein contain a lot of slang and typos, which have been left in place when depicted as a direct quotation.

Alvino responded, “You are free to do what ever you like. I will be doing an investigation into the entire incident and I hope you can understand that it takes more than 45 minutes to do a thorough investigation. My advise for you right now is to call unemployment.” Hall responded
 5 that no other companies were hiring. Alvino then texted Hall:

I have a few questions What time did you go to the clinic? How long were you there?
 What time did you call Vicky? What clinic did you go to? Most important who
 specifically said they wanted to get you fired? And especially who made the statement to
 10 “send your black ass back to NY” ?

Hall replied:

Went to the clinic like 8am at the clinic for 30 min I called and texted Vicky while I was
 15 there and be for we left and she said go get your meds and there can bring me back to the test site.¹⁵

The Forman Spanish guy from sheet metal side at the job and was also drawing on
 cardboard boxes we hate New York His name is fabean

(Jt. Exh. 1.)

On September 27, 2019, Alvino informed Hall that he could either serve a 30-day
 suspension or sign up for an assistance program. (R Exh. 3.) Hall entered the Union’s substance
 25 abuse program MINES and successfully completed it. He passed a drug test and in early October the counselor at the program determined he could return to work. (Tr. 63–64.)

Alvino looked into the events of September 26. He spoke with Italiano, Gaeta, and the
 supervisors who smelled the marijuana, Tim Hill and Tom Marquardt. (R Exh. 4; Tr. 198–199.)
 30 He also spoke with two clinicians from the drug testing site. They told him Hall was informed that if he left the facility it would be considered a refusal of the test. (R Exh. 4.) Alvino also spoke with Steve O’Donnell, the superintendent at the jobsite, and Kevin Luna, a journeyman. Alvino concluded that Hall had not been singled out or targeted at U.S. Engineering. (Tr. 210.)

With regard to Perez’ conduct and Hall’s claim that U.S. Engineering was racist, Alvino
 spoke with, Roy Atkins, another African American employee on the jobsite, and concluded that
 other employees were uncomfortable with Hall’s use of the N-word.¹⁶ (R Exh. 4; Tr. 207–210,
 231–235.) Alvino reached out to Trent Bollman, the foreman at Hall’s first job with U.S.
 Engineering at Bollman Tech and talked to people who had worked with Hall to find out if they
 40 had witnessed racial discrimination against him. Alvino was unable to substantiate Hall’s claims. (Tr. 215–216.)

¹⁵ There is no contemporaneous text between Hall and Shields while Hall was at the clinic, nor is there any text at all in the record from Shields instructing him to leave the clinic without testing.

¹⁶ Hall referred to Atkins as “the black guy that thinks he’s white.” (Tr. 112.) With regard to use of the N-word, Hall testified, “I think Mexicans feel like they can say the N-word. I mean, I - we all shouldn't say it. But I mean, we're black. I feel like we can say it, but it's not a good word.” (Tr. 118.)

Stephens also looked into the matter. Stephens spoke with Gaeta, Marquardt, Italiano, Shields, a member named Unique Palmer, and an apprentice named Josh Peppers. (Tr. 259–260.) Hall had told Stephens he had copies of text messages to substantiate his claims of racism. Stephens requested these, but Hall did not provide them.¹⁷ (Jt. Exh. 2; Tr. 248–250.) Stephens also asked Hall to forward any relevant information from members Jama’hl Hardaway and Palmer, whom Hall had said could substantiate his claims. No information was forthcoming. (Jt. Exh. 2; Tr. 258.)

Alvino did not recall Hall telling him he wanted to file a grievance over the events of September 26. In any event, Alvino did not find a violation of the contract after his investigation, so in his opinion there was no grievance to file on Hall’s behalf. (Tr. 236; R Exh. 5 p. 48.) Stephens recalled Hall asking at some point about filing a grievance. Following Alvino’s investigation, and Stephens’ follow-up with the above witnesses, Stephens determined that there were no grounds to file a grievance. (Tr. 251.)

On October 9, Stephens asked Hall if he could come to the office either the next day or Friday. They arranged to meet at the Union office at 11 a.m. on October 10. Stephens said he would be reaching back out to talk to witnesses Hall had identified. (Jt. Exh. 2, pp. 12–14.) Hall left the meeting because he did not have representation and he wasn’t permitted to record the meeting. (Tr. 71–74.) Hall followed up on October 14, and Stephens texted him the same day saying he was reaching back out to people. On October 21, Hall texted Stephens expressing frustration that he had talked to his witness who told him Stephens had not reached out to them. (Jt. Exh. 2 pp. 15–16.)

C. The Alleged Threat

During a union meeting on November 6, Hall stated that Perez had called him the N-word. The Union brought charges against Hall, alleging the statement that Perez called Hall the N-word was false.¹⁸

Hall began a job working at Murphy Engineering.¹⁹ Alvino came to the jobsite in November to give another employee, Roman Naujoks, money he was owed from a previous job. Naujoks told Alvino that he thought he was owed some backpay and wanted to pursue it. He informed Alvino that Hall had taught him about his rights as a union worker. Hall then approached Alvino and Naujoks and the following ensued:

¹⁷ Hall did provide a text string from September 13 about a bet, which Hall contends was a bet about him and how long he will last on the job. It is not clear from the face of the texts who the two participants are, and the text string appears incomplete and disjointed. There is also a picture of a phone screen but it is too blurry to decipher. (Jt. Exh. 2 pp. 5–5.)

¹⁸ During his trial for these charges on January 14, 2020, Hall testified:

Q. To clarify, did John Perez say to you, to your face, Brother Hall, ever call you the N-word?

A. No

(R Exh. 5, p. 65.) At this hearing in the instant case, Hall testified Perez did call him the N-word at the November 6, 2019 union meeting. (Tr. 120–121.)

¹⁹ This job was self-solicited.

Q And then did you speak to Mr. Alvino?

A Jon Alvino, you know, I was standing right next to a - -100 -- 100 - it was a big duct. Probably, like, big enough for seven people to put inside. I was inside, installing a fire damper. He didn't even know I was in the duct, so I see him handing Roman this check. I was in the duct, heard everything he's saying. I came out of the duct, and I asked Jon Alvino, what's up with these charges you filed - you filed charges against me and John Perez filed charges against me. I -- how -- how -- if someone called me a nigger and not by my name and everything, how you guys file charges against me?

And that's where he - we just got into a back and forth and he started screaming yo, man - we've got into a back - a back and forth. And he started screaming some of his own words and my words, saying he basically he could stop me for working, if I don't leave him. Basically.

(Tr. 85.) Hall asked Alvino if he was going to stop him from working, and at that point the Superintendent, Jason Anderson, came and told them to leave. Naujoks heard Hall ask why Alvino had pressed charges against him, and he heard Alvino tell Hall he could make it so that Hall didn't work. (Tr. 153.) Naujoks did not think the comments about the charges and Hall not being able to work were correlated but he was not certain one way or the other. (Tr. 156.)

Alvino recalled that after he spoke with Najouks, Hall approached him and Luis Tony Villareal, Murphy's assembly shop foreman, in the break room and asked about the upcoming trial for the charges the Union had filed against him. Alvino said it was up to the trial committee to determine, but it could include suspension, a fine, or expulsion. (Tr. 221–222.)

Anderson recalled he was in his office on the phone when he heard Hall and Alvino yelling at each other. He put his call on hold briefly and told them to take their conversation outside. He did not hear the substance of the argument. (Tr. 243–244.) Villareal was in the room with Hall and Alvino. Villareal recalled the conversation got heated, but he did not hear any threats. (Tr. 270–271.)

DECISION AND ANALYSIS

A. *Alleged Breach of Duty of Fair Representation*

Complaint paragraphs 6, 8, and 9 allege the Respondent violated Section 8(b)(1)(A) by failing and refusing to file a grievance over Charging Party's discharge by the Employer under the provisions of the applicable collective bargaining agreement.

1. Legal Standards

Section 8(b)(1)(A) of the Act provides that it is an unfair labor practice for a labor organization or its agents to restrain or coerce employees "in the exercise of the rights guaranteed in section 7 [section 157 of this title]: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or

retention of membership therein.” The rights guaranteed in Section 7 include, in pertinent part, the right “to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and . . . to refrain from any or all of such activities. . . .”

As a judicially recognized protection implicit within the Act, a union has a duty of fair representation to its members. See *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953). More specifically, in *Vaca v. Sipes*, 386 U.S. 171, 177 (1967), the Supreme Court defined this duty as “a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.” The Board thus has determined that a union’s breach of the duty of fair representation qualifies as an unfair labor practice under the Act. See *Miranda Fuel Co.*, 140 NLRB 181, 185 (1962), enf. denied 326 F.2d 172 (2d Cir. 1963).

A union’s duty of fair representation includes processing members’ grievances in a timely and impartial manner. The Supreme Court has made clear that a union is not required to process every grievance to arbitration. *Vaca* at 191 (“[W]e do not agree that the individual employee has an absolute right to have [a] grievance taken to arbitration. . . .”); *Electrical Workers (IBEW) v. Foust*, 442 U.S. 42 (1979) (“union discretion is essential to the proper functioning of the collective bargaining system.”) Rather, to rise to the level of a breach of its duty, the union must be motivated by bad faith, acting for discriminatory reasons, or engaging in arbitrary conduct. A “union’s actions are arbitrary only if, in light of the factual and legal landscape at the time of the union’s actions, the union’s behavior is so far outside a ‘wide range of reasonableness,’ *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338, 73 S.Ct. 681, 686, 97 L.Ed. 1048 (1953), as to be irrational.” *O’Neill v. Air Line Pilots*, 499 U.S. 65 (1991).

There is no requirement that the grievance be meritorious to find a union breached its duty of fair representation by failing to process the grievance. *Glass, Pottery, Plastics & Allied Workers International Union, Local 15 (Owens-Corning Fiberglass Corporation)*, 282 NLRB 1296, 1299 (1987).

2. Analysis

In the instant case, I find both Alvino and Stephens made reasonable and good faith efforts to investigate Hall’s concerns.²⁰ Even though Hall’s text to Alvino about what occurred on September 26 was his stated grievance, both Alvino and Stephens went beyond the events of that day and looked into Hall’s more general complaint that U.S. Engineering was a racist company, as detailed in the statement of facts.

²⁰ Alvino testified that Hall never expressed his intent to file a grievance. The circumstances surrounding the text message that Hall says comprise the grievance are certainly murky. I find it odd that Hall did not refer to a grievance or thank Alvino for his offer to “put it on paper” and file it for him. Stephens, however, recalled Hall following up on the matter and inquiring about his grievance. Any confusion over the matter is therefore not material, however, as Stephens treated it as a request to file a grievance.

The Acting General Counsel contends that the Respondent’s investigation into Hall’s allegations was biased. First, the Acting General Counsel points to Alvino’s brief conversation with Blackburn, who was a direct witness to Hall’s treatment on September 26. Blackburn, however, testified that after he made his own complaint, “then they started questioning me about what happened in the clinic that day with Mr. Salah. And I informed them, just like I stated on the stand here, what happened.” (Tr. 99.) In light of Blackburn’s own testimony, this argument is unpersuasive.

The Acting General Counsel further contends that a “complete interview of Blackburn, a credible and unbiased witness, would have supported Hall’s account of events regarding Foreman Gaeta’s conduct toward him and the fact that Hall was told he could go take his insulin and come back and take the test.” (R Br. 17.) Notwithstanding Blackburn’s own testimony above that he was interviewed, this contention rests on a glaringly faulty premise. Blackburn never heard Shields tell Hall he could go back and take his insulin and then return for the drug test. Though Hall claimed he was on speaker phone when he spoke to Shields, Blackburn testified he did not know who Hall had called, and it is clear he only learned what the individual on the other end of the line ostensibly said after Hall hung up the phone and relayed it to him and Faeta.

Shields specifically and clearly recalled being pulled out of a meeting to take Hall’s call from the clinic and telling him that protocol was he could not leave the clinic, and if he did it would be a failed drug test. I squarely credit Shields over Hall on this point.²¹ First, as U.S. Engineering’s occupational health employee, she was physically removed from the day-to-day personalities and conflicts at the jobsite. There is no evidence at all that Shields held any ill will toward Hall, or that she was motivated to single him out for discriminatory treatment. In addition it is curious that Hall testified he texted Shields from the drug testing site, yet the only text messages between Shields and Hall in the record are from after the fact, when Hall had already returned to the jobsite without taking his drug test.

The Acting General Counsel asserts that even if Hall did leave the clinic resulting in a failed drug test, the circumstances leading up the Hall and Blackburn being sent for the drug test in the first place were suspicious. While Hall and Blackburn both recounted irregularities in the process of sending them to the drug test, their accounts also differ significantly from each other’s. Hall said Gonzalez was not at the jobsite on September 26 and he was approached by the acting foreman. Blackburn said Gonzales told him he needed to be drug tested that day. Hall said he witnessed the acting foreman approach Blackburn about the drug test as he was coming off the elevator. Blackburn said he was at his workstation preparing for the day’s tasks when

²¹ Credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor was primarily considered in making credibility resolutions. I also considered the inherent probability of the testimony and whether such testimony was in conflict with credited testimony or documentary evidence. See, e.g. *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). Hall’s testimony was in general unfocused, often times unclear, and at times contradictory. For example, he testified that he was the only black person in the Union. (Tr. 23.) Yet, the record clearly shows this is not the case. As the record shows, Hall had to be repeatedly redirected to the question asked of him, and he was prone to becoming agitated. His testimony and the testimony of other witnesses contrary to my findings has been discredited.

Gonzales approached him about the drug test. Given the amount of uncertainty as to how things actually transpired, I find the Acting General Counsel has failed to establish a discriminatory motive in the Union’s failure to pursue a grievance over the drug test.

Finally, the Acting General Counsel contends that the timing of the Union’s charges against Hall demonstrates bias. Specifically, the Acting General Counsel faults the Union for waiting until after Hall accused Perez of calling him the N-word to bring charges, showing arbitrary favoritism for Perez. While the Union chose to bring charges against Hall only after the November 6 union meeting where Hall said Perez called him the N-word, it is clear the charges encompass conduct against employees other than Perez. Moreover, if Perez was truly the favored member, it seems the Respondent would have seized upon Hall’s threat to throw him out of a window in September to file charges against Hall. Particularly considering there was an ongoing investigation into Hall’s allegations in and around the same time period as the charges, I am not in a position to second-guess when the right time was for the Union to bring charges against Hall under its contract.

While Alvino and Stephens may not have conducted the investigation to Hall’s liking, the evidence does not prove it was not undertaken in bad faith, for discriminatory purposes, or arbitrarily. I find the Acting General Counsel has not met the burden of proof to sustain this Section 8(b)(1)(A) allegation, and I therefore recommend dismissal of complaint paragraph 6.

B. Alleged Threat

Complaint paragraphs 7 and 10 allege the Respondent violated Section 8(b)(1)(A) of the Act when, in early November 2019m Alvino threatened Hall by telling him he could prevent him from working in the State of Colorado.

1. Legal Standards

Under Section 8(b)(1)(A), a remark is an unlawful threat if, under all the circumstances present, it may reasonably tend to coerce or restrain employees in the exercise of their Section 7 rights. *Longshoremen ILA Local 333 (ITO Corp.)*, 267 NLRB 1320, 1321 (1983); *Laborers Local 496 (Newport News of Ohio)*, 258 NLRB 1105 fn. 2 (1981); *Steelworkers Local 1397 (U.S. Steel Corp.)*, 240 NLRB 848, 849 (1979). The legal standards are objective, and do not consider the speaker’s intent, or whether any employee was actually coerced by the remark. *United Steelworkers of America, AFL-CIO-CLC, Local Union 5550 (Redfield Company, a Division of Outdoor Sports Industries)*, 223 NLRB 854, 855 (1976); *Local 542, International Union of Operating Engineers AFL-CIO v. N.L.R.B.*, 328 F.2d 850, 852 (3d Cir. 1964), enf. 139 NLRB 1169 (1962), cert. denied 379 U.S. 826 (1964).

A union agent commits an unfair labor practice when he threatens an employee with loss of employment for exercising Section 7 rights. See *Carpenters Union Local 180*, 328 NLRB 947, 948 (1999) (finding a violation when a union agent told a unit member that he was ““going to lose all of [his employment] benefits” for leaving the union but staying with the company).

2. Analysis

The accounts of what occurred on the November day differ substantially. The individuals present were Hall, Najouks, Alvino, Villareal, and Anderson. Their respective recollections are set forth in the statement of facts and are summarily reiterated here.

Hall said he started off the conversation with Alvino by asking him what was up with the charges Alvino filed against him. The following ensued: “And that’s where he - we just got into a back and forth and he started screaming yo, man - we’ve got into a back - a back and forth. And he started screaming some of his own words and my words, saying he basically he could stop me for working, if I don’t leave him. Basically.” (Tr. 85.) This is his complete testimony.

Najouks recalled Hall starting the conversation by asking Alvino why he had filed charges against him. He recalled, “It started getting heated pretty much right after that. Basically, like an argument of, like, just kind of a banter of, like, arguing, and Jon Alvino was saying a few things. And one of the things, in particular, was talking about not keeping him from working, and saying, I can make it so you don’t work.” (Tr. 153.) Najouks did not think the comments about the charges and Hall not being able to work were correlated but he was not certain one way or the other. Alvino said he merely responded to Hall’s question about the charges the Union brought against him and what the consequences could be, which included suspension and expulsion. Anderson recalled he was in his office on the phone when he heard Hall and Alvino yelling at each other. He put his call on hold briefly and told them to take their conversation outside. He did not testify about the substance of the discussion, ostensibly because he was on the phone and trying to ignore them. (Tr. 243–244.) Villareal was in the room with Hall and Alvino. Villareal recalled the conversation got heated, but he did not hear any threats. (Tr. 270–271.)

Some of the few undisputed points are that it was Hall who approached Alvino to confront him about the charges the Union filed against him, and the conversation quickly became heated. Interestingly, no witness (including Hall) recalled the substance of the argument other than (1) how it started with Hall approaching Alvino upset about the charges, and (2) a comment about stopping Hall from working—nothing in the record bridges these two parts of the conversation in any way. What precisely was said on point 2 is not clear from Hall’s testimony. Hall said, “[H]e could stop me for working, if I don’t leave him.” Najouks recalled a comment about stopping Hall from working but could not be certain it was attenuated from the charges against Hall. Alvino claimed the argument was solely about the charges, and any reference to Hall being out of work was tied to a possible consequence of the charges. Villareal, who was present for the conversation between Hall and Alvino, did not hear anything he perceived as a threat. No witness, not even Hall, testified that Alvino said he could prevent him from working in the State of Colorado.²² Simply put, the evidence is too lacking in substance and detail to sustain the allegation.

²² In response to a leading question from the Respondent’s counsel, Najouks stated:

Q. Okay. And you - and you heard, that’s when you heard this alleged statement about Jon and Salah - or Jon saying that Salah might not be able to work anymore in Colorado?

A. Yes.

(Tr. 158.) When he was describing the conversation in his own words, however, Najouks recalled

The Acting General Counsel asserts that Alvino’s comment was a coercive threat because it was made in response to Hall standing up for his rights. But Hall did not stand up for concerted rights that bear any real nexus to the alleged threat.²³ He initiated the conversation with Alvino, not about any concerted member concerns, but about his personal ire regarding the charges the Union brought against him. The conversation at issue is attenuated from Section 7 activity.²⁴

It is important to note that the Acting General Counsel bears the burden to prove Alvino made an unlawful coercive threat. Given the lack of any evidence that Alvino told Hall he could prevent him from working in the State of Colorado, and the muddled and scant evidence about what Alvino actually said, particularly considering the context, I find the Acting General Counsel has not met the burden to prove complaint paragraph 7.

CONCLUSIONS OF LAW

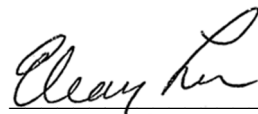
The Respondent did not violate Section 8(b)(1)(A) of the Act by failing and refusing to file a grievance over the Charging Party’s discharge by the Employer under the provisions of the collective-bargaining agreement, or by threatening the Charging Party.

Accordingly, based on the foregoing findings of fact and conclusions of law and the entire record, I issue the following recommended

ORDER

The complaint is dismissed.

Dated, Washington, D.C. April 2, 2021



Eleanor Laws
Administrative Law Judge

Alvino’s comment as, “I can make it so you don’t work.” (Tr. 153.)

²³ Notably, no witness testified that Hall approached Alvino regarding anything to do with Najouks’ paycheck or other member rights. By all accounts, Hall approached Alvino about the Union’s charges against him.

²⁴ In this regard, this case varies markedly from the line of cases holding that it is a coercive threat to tell an employee they will be put out of work if they don’t join the Union. Obviously, such a remark clearly coerces the employee in the exercise of his or her Section 7 right to join a union or refrain from doing so.